BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

GWENDOLYN TANDY	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 12-2102-EL-CSS
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,	)	
	)	
	)	
Respondent.	)	

MOTION TO STRIKE AND MEMORANDUM IN SUPPORT OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

I. MOTION TO STRIKE

In accordance with Ohio Adm. Code 4901-1-12(A), The Cleveland Electric Illuminating Company ("CEI" or "the Company") hereby requests that the Commission strike Complainant Gwendolyn Tandy's February 14, 2013 filing submitting additional information. Good cause exists to strike the February 14 filing in its entirety because it was not timely filed in accordance with the procedural schedule for this proceeding. Good cause also exists to strike all but pages 1, 2, 18, and 19 of the filing, because the filing presents a substantial amount of new documents and information that were not presented at hearing. For these reasons, as explained in the following memorandum in support, CEI respectfully requests that Commission grant its motion to strike.

II. MEMORANDUM IN SUPPORT

There are two bases for granting CEI's motion to strike Ms. Tandy's February 14 filing. First, the entire filing should be struck because it was untimely filed. Second, and independent of the first basis, most of the filing is merely a presentation of new documents and information following the close of the record and should be struck to that extent.

A. The entire document should be stricken because it was filed after the Commission-ordered deadline.

The first ground for striking the February 14 filing is that it was untimely.

The Commission has found that where a document to a proceeding is filed past the deadline set by the procedural schedule for a certain matter, that document should be struck from the record. *See, e.g.*, *In re the Application of Columbus Southern Power Co.*, Case No. 11-346-EL-SSO, 2012 Ohio PUC LEXIS 738, at *27 (Aug. 8, 2012) ("the attorney examiner set an expedited procedural schedule establishing that any memoranda contra be filed within five calendar days after the service of any motions. Therefore, as FES filed its memorandum contra 17 days after OCC/APJN filed its motion, OCC/APJN's motion to strike shall be granted."); *In re the Investigation into Ameritech Ohio's Entry Into In-Region InterLATA Service*, Case No. 00-942-TP-COI, 2001 Ohio PUC LEXIS 961, at *16 (Dec. 20, 2001) (striking reply brief filed after the procedural deadline).

In this complaint proceeding, by Entry dated January 24, 2013, the Attorney Examiner ordered that post-hearing briefs be filed with the Commission no later than February 12, 2013. (January 24, 2013 Entry at 1.) Although Ms. Tandy had approximately three weeks to prepare and file a brief, she did not file anything until February 14, 2013. To adhere to a procedural schedule does not require understanding of complex legal or evidentiary issues, and there is no reason not to require a pro se complainant to make timely filings. Thus, Ms. Tandy's status as a pro se complainant should not absolve her of the responsibility to submit filings when the Commission says they should be submitted.

Because the filing was filed after the deadline set by the January 24, 2013 Entry, it should be struck from the record in this proceeding in its entirety.

B. Ms. Tandy's February 14 filing should also be struck to the extent it is not a brief but a submission of new documents and information.

There is an independent basis for striking much of Ms. Tandy's February 14 filing. In essence, much of the filing is not even a brief, but yet another deposit of records and information.

The examiner informed Ms. Tandy that "a brief" was to be filed by February 12, and she explained what a brief was. Ms. Tandy asked, and the examiner explained, that a brief is "a written summary of what you think you've proven [in] the testimony submitted today. I'm going to give you the option, Ms. Tandy. Do you want to write a paper on what you think you've established here today?" (Tr. 101.) Yet the filing on February 14 contains only 4 pages of actual written summary, while the vast majority of the submission (44 pages) is simply more documents and materials.

Thus, in addition to being untimely filed, all of the information besides the written summaries on pages 1, 2, 18, and 19 should be struck because the information does not constitute a brief and appears to be an attempt to introduce new evidence after the record has closed.

1. Ms. Tandy's filing is not a brief, but a new submission of evidence.

Ms. Tandy's opportunity to introduce new evidence ended at the hearing. *See Columbus Bd. of Educ. v. Franklin County Bd. of Revision,* 76 Ohio St.3d 13, 16–17 (1996) (holding that "documents [that] were not part of the original record . . . and were submitted after the [agency's] hearing . . . must be disregarded by the BTA"); *In re the Application of Black Fork Wind Energy*, Case No. 10-2865-EL-BGN, 2012 Ohio PUC LEXIS 299, at *35 (Mar. 26, 2012) ("there is no basis on which to admit an exhibit outside of a hearing, after the close of the record of the case").

Again, Ms. Tandy has no excuse for the non-compliant filing, as the examiner also explained to her that the hearing was ending:

> EXAMINER SEE: -- do you have other questions for [CEI witness] Ms. Reinhart?
>
> MS. TANDY: Not at this time, but I reserve the right to reexamine, ask questions of [CEI's witness] at the next hearing.
>
> EXAMINER SEE: *We are going to conclude CEI today, Ms. Tandy*. If it took this long for us to get through CEI, there's no way we could do CEI and Dominion in another day.

(Tr. 95 (emphasis added).)

The bulk of her February 14 filing is not what was authorized by Commission entry (a post-hearing brief) but simply an attempted submission of evidence. Accordingly, it must be struck.

2. Relying on information submitted after the record closed would deny CEI due process.

Were the Commission to rely on this evidence, it would also create a constitutional error. CEI had no opportunity at hearing to review the newly submitted materials, to cross-examine Ms. Tandy regarding those materials, or to introduce its own rebutting evidence in response. Were the Commission to rely on such evidence in these circumstances, it would deny CEI due process.

Due process demands notice and an opportunity to be heard—"each side of the controversy must be given an opportunity to present its case." *Motor Service Co. v. Pub. Util. Comm.*, 39 Ohio St.2d 5, 10 (1974); *Cent. Ohio Lines v. Pub. Util. Comm.*, 123 Ohio St. 221, 227 (1931) ("The principle is elemental that, upon any hearing, each side of the controversy must be given an opportunity to present its case."). Thus, due process is violated when a tribunal bases its decision on evidence received "after trial": "There is an obvious and fundamental unfairness in receiving evidence [after trial], for it violates due process requirements," as it "deprive[s the parties] of the opportunity to test, explain or rebut it." *In re Hoffman*, 97 Ohio

St.3d 92, 2002-Ohio-5368, ¶ 20 (internal quotations omitted); *see also, e.g.*, *State ex rel. Canter v. Industrial Comm*., 28 Ohio St.3d 377, 380 (1986) ("A party is entitled, of course, to know the issues on which [the agency's] decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation"). CEI had no opportunity before closure of the record to test or rebut Ms. Tandy's newly proffered evidence, so it cannot lawfully be relied upon by the Commission.

3. While improperly submitted, the new evidence on its face does not support Ms. Tandy's complaint.

Because the new information was improperly submitted, it must be struck from the record. Nevertheless, to preserve its interests, CEI would note that even taking it on its own terms, without an opportunity for cross-examination or rebuttal, the new materials do not appear to support Ms. Tandy's complaint.

Ms. Tandy's new filing appears to focus on her allegation that a tenant, and not Ms. Tandy, was responsible for a $268.08 balance accrued beginning February 2011 on her account ending 7153 (and that was transferred to her account ending 0079). (*See* July 17, 2012 Complaint at 7 and 8 ("Need Rental lease. [emphasis sic] Mr Tinsley [sic] was responsible for the illumination co [sic] for Feb 2011 – Feb 1, 2012").)

But Ms. Tandy's new filing only *confirms* that she was the customer of record for account ending 7153 as of February 2011 and thereafter. (*See* February 14, 2013 filing at 28, 30, 31, 32, 34, 35, and 37.) These pages all show that after February 2011, Ms. Tandy was the customer of record on the account ending 7153. Indeed, not only was Ms. Tandy's name on bills for account ending 7153 after February 2011, but she implicitly acknowledged that they were her responsibility by making sporadic payments against them. (*See* February 14, 2013 filing at 32,

34 and 35 ("Total payments/adjustments" section show payments against account ending 7153).) This certainly does not contradict CEI's well-supported position that "Ms. Tandy remained the customer of record" even after February 2011. (Reinhart Dir. at 6; CEI Ex. 8.0.)

III. CONCLUSION

For the foregoing reasons, CEI respectfully requests that the Commission strike the February 14, 2013 filing in either its entirety or in part, as set forth above.

Dated: February 25, 2013

Respectfully submitted,

/s/ Gregory L. Williams

Mark A. Whitt (Counsel of Record)
Andrew J. Campbell
Gregory L. Williams
WHITT STURTEVANT LLP
The KeyBank Building
88 E. Broad Street, Suite 1590
Columbus, Ohio 43215
Telephone: (614) 224-3911
Facsimile: (614) 224-3960
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com

ATTORNEYS FOR THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike was served by U.S. mail to the following person this 25th day of February, 2013:

Ms. Gwendolyn Tandy
1439 Sulzer Ave.
Euclid, Ohio 44132

/s/ Gregory L. Williams
One of the Attorneys for
The Cleveland Electric Illuminating
Company

Summary: Motion to Strike and Memorandum in Support electronically filed by Mr. Gregory L. Williams on behalf of The Cleveland Electric Illuminating Co.